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No. 90-5358

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

THOMAS BRAXTON,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Thomas Braxton, the Petitioner, has raised the question of whether "a stipulation that specifically establishes a more serious offense than the offense of conviction," according to United States Sentencing Guideline Section 1B1.2(a), can exist in light of a finding of fact that "there was no plea agreement, written or oral, and there was no agreement of the facts designated to be a Stipulation." United States v. Braxton, 903 F.2d 292, 297 (4th Cir. 1990). In this case, Mr. Braxton pleaded guilty without a



plea agreement to a charge of assault on federal officers, but received a sentence calculated on a charge of attempted murder which was subsequently dismissed by the government.

Respondent raises a series of arguments in support of its position that this Court should not consider whether a stipulation within the meaning of U.S.S.G. 1B1.2(a) may exist in the absence of a plea agreement or a stipulated set of facts. None of these arguments, however, address directly the substantive points raised in the Petition.

First, Respondent ignores authority in other Circuit Courts of Appeal which holds that the stipulation contemplated under U.S.S.G. Section 1B1.2(a) is a formal agreement between the government and the defendant. See, e.g., United States v. Garza, 884 F.2d 181 (5th Cir. 1989); United States v. Guerrero, 863 F.2d 245 (2d Cir. 1988). Moreover, Respondent summarily dismisses Judge William Wilkins' commentary on the intent of the United States Sentencing Commission in drafting U.S.S.G. Section 1B1.2(a). Judge Wilkins, as Chairman of the United States Sentencing Commission, is perhaps the best authority on Sentencing Guidelines interpretation. Thus, Judge Wilkins' opinion that Section 1B1.2 contemplates a negotiated quid pro quo cannot be taken lightly. Wilkins, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 South Carolina L. Rev. 495, 501 (1990). See United States v. Strong, 891 F.2d 82, 85 (5th Cir. 1989).

Second, even assuming that section 1B1.2 does not envision a formal agreement made as part of the plea bargaining process,

Respondent overlooks two critical portions of the record from the district court: (1) the district court specifically found that the parties did not enter into a stipulation under Section 1B1.2 and (2) Respondent specifically denied any intent to kill, thereby raising a disputed factual issue regarding the attempted murder charge. Therefore, contrary to Respondent's assertions the Mr. Braxton agreed to the attempted murder offense, and the Fourth Circuit's redefinition of "stipulation" as a kind of public agreement, Respondent never agreed to facts establishing attempted murder,[1] the offense on which his assault on federal officers guideline was based.

Third, Respondent suggests that U.S.S.G. Section 1B1.3 and the right of a court to depart upward provide alternative bases for Petitioner's sentence. Section 1B1.3 does not apply because none of the triggering factors necessary for its application are present in this case. Upward departures, moreover, must be guided, with an articulated justification for each step upward in a base offense level or criminal history calculation. See, e.g., United States v. Montenegro-Rojo, ___ F.2d ___, 47 Cr. L. Rep. 1370, Slip Op. No. 88-5161 (9th Cir. July 11, 1990); United States v. Nuno-Para, 855 F.2d 1409 (9th Cir. 1989); United States v. Cervantes, 878 F.2d 50 (2d Cir. 1989); United States v. Lopez, 871 F.2d 513 (5th Cir.

[1] Respondent's statement made at the time of his plea and in reply to the government's statement of facts that he thought the two shots were fired simultaneously is further evidence that Respondent disagreed with the facts supporting attempted murder. See United States v. Braxton, 903 F.2d 292, 297 (4th Cir. 1990). This is of course significant because the timing of the shots is circumstantial evidence of defendant's intent.



1989). Upward departures cannot be justified by general statements, like that used by the trial court in this case, that the trial court would somehow depart to give a certain sentence. Braxton, 903 F.2d at 298 (4th Cir. 1990).

Finally, Respondent's brief sets forth a position that would result in the complete breakdown of the plea bargaining process. Under Respondent's theory, anytime a defendant agreed to a statement of facts establishing a more serious offense the sentencing court could determine the base offense level using the more serious offense. A court could do this despite the presence of a plea agreement establishing a lesser base offense level, or, as in this case, despite the fact that the sentencing court found as a matter of fact that no Section 1B1.2(a) stipulation had been entered into by the parties.

This scenario also would negate the need for the court to determine, in deciding to accept an agreement under U.S.S.G. Section 6B1.2(a), p.s., whether the charges remaining in a plea agreement after a negotiated dismissal of other charges "adequately reflect the seriousness of the actual offense behavior." Instead, the court could simply accept the plea agreement and calculate the guideline based upon the more serious offense.

**CONCLUSION**

In conclusion, this Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit so that it may review the substantial question of law presented by the petition.

Respectfully submitted,

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October 25, 1990



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Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that a true and exact copy of the Petitioner's Reply attached hereto was mailed, first class postage pre-paid, this 25th day of October, 1990, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

Respectfully submitted,

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